

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6047

ORIG. AFFIDAVIT OF
MAILING

To be argued by
CYRIL HYMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6047

KENNETH KOE, LAWRENCE LOE, MATHEW MOE and NATHAN NOE
(all pseudonyms) on behalf of themselves and all
others similarly situated,

Appellants,

- against -

JOSEPH A. CALIFANO, JR., as Secretary of the United
States Department of Health, Education and Welfare;
BERNICE BERNSTEIN, as Regional Commissioner of the
United States Department of Health, Education and
Welfare (Region II); and, THE UNITED STATES OF
AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF FEDERAL APPELLEES

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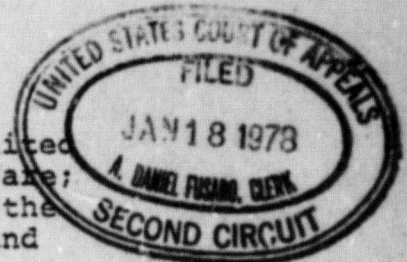
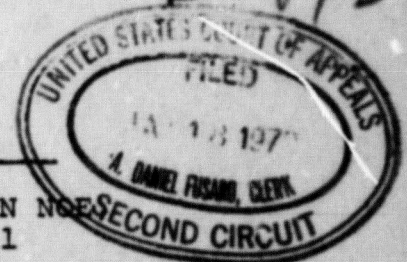


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PRELIMINARY STATEMENT

This is an appeal by involuntarily committed state mental hospital patients from the January 13, 1977 order of the United States District Court for the Eastern District of New York (Neaher, J.), which order dismissed appellants' constitutional and statutory claims against the United States Department of Health, Education and Welfare, and the United States of America. Woe v. Mathews, (Order dated January 13, 1977 by District Judge Neaher, Docket Numbers 75 C 1029, 75 C 2178, 76 C 642) (C-1). */

*/ Designations refer to pages in the Appellants' Appendix submitted on this appeal.

STATEMENT OF THE CASE

This appeal represents the latest chapter in a series of cases brought on behalf of patients in state mental hospitals to challenge various provisions of the Social Security Act which set forth the conditions upon which eligibility for Medicaid coverage and receipt of Supplemental Security Income payments by patients in such hospitals is made contingent. Two cases are consolidated on this appeal. The first case, Yoe v. Kolb, which challenged the exclusion from Title XIX Medicaid coverage of state mental hospital patients between the ages of 21 and 65, involves issues which have already been disposed of by this Court in the related case of Woe v. Mathews. ^{1/} The second action, Koe v. Mathews, was brought by state mental hospital patients over the age of 65 to challenge the constitutionality and application of Section 1611(e)(1)(B) of Title XVI, 42 U.S.C. §1382(e)(1)(B), under which those patients were temporarily declared ineligible to receive Supplemental Security Income [SSI] benefits because the state institution in which they were confined no longer

^{1/} The earliest action, Woe v. Mathews, 408 F. Supp. 419 (E.D.N.Y. 1976), was a class action, brought on behalf of all state mental hospital patients between the ages of 21 and 65, challenging, inter alia, the allegedly irrational and arbitrary exclusion of such patients from Medicaid coverage under the Medicaid Statute, 42 U.S.C. §1396d(a). That case was finally disposed of, as to the Federal defendants on June 10, 1977, when this Court affirmed the January 16, 1976 judgment of the district court which dismissed the Woe appellants' claim against the Federal defendants and held the exclusion of such patients constitutional. Woe v. Mathews, _____ F.2d _____, Docket No. 76-6031, Slip Opinion, (2d Cir., June 10, 1977).

qualified for the receipt of Title XIX Medicaid payments, a statutory prerequisite to the receipt of SSI benefits by patients confined to any state institution.

The Yoe action was commenced on October 31, 1975, by Yetta Yoe, a 21-year-old mental patient involuntarily committed by civil action to Brooklyn State Hospital, and Zelda Zoe, her mother and guardian. They brought the action individually and purportedly as a class action to challenge the allegedly irrational and arbitrary exclusion from Medicaid coverage of all state mental hospital patients between the ages of 21 and 65. They claimed that since involuntarily civilly committed patients have a constitutional right to receive adequate care and treatment, the Medicaid exclusion violated the equal protection clause by serving to perpetuate a two-tier mental care system favoring patients in private hospitals and those who were voluntarily committed to state hospitals. The Yoe complaint was summarily dismissed as to the Federal defendants by the district court on January 13, 1977, upon Judge Neaher's finding that the claims tendered in the Yoe complaint were identical to those in Woe.

Koe v. Mathews, consolidated on this appeal, was precipitated by events which transpired during the pendency of Woe v. Mathews, supra. On November 17, 1975, the plaintiffs in Woe moved to amend their complaint to add a new class of

plaintiffs--- all involuntarily civilly committed state mental hospital patients over the age of 65 who might be deprived of SSI benefits solely because the institution to which they were committed had become ineligible to receive Medicaid reimbursement payments under Title XIX. 2/ Plaintiffs' motion grew out of actions taken by the Department of Health, Education and Welfare. On November 18, 1975, the Secretary of HEW notified the Director of Pilgrim Psychiatric Center in Brentwood, New York that the Center and its patients would no longer be eligible for federal assistance under Title XIX Medicaid because the Center had lost its accreditation by the Joint Committee on Accreditation of Hospitals [JCAH]. 3/ HEW planned to notify those patients at the Center who were receiving SSI benefits that those benefits were to be terminated. Consequently, the Woe plaintiffs sought to amend their complaint to permit

2/ Section 1611(a)(1)(A) of Title XVI, 42 U.S.C. §1382(a)(1)(A), extends SSI benefits to "aged, blind, or disabled individuals" who meet certain specified requirements. Section 1614c(a)(1)(A), 42 U.S.C. §1382c(a)(1)(A), includes persons over the age of 65 in the definition of "aged, blind or disabled". Section 1611(e)(1)(B) of Title XVI, 42 U.S.C. §1382(e)(1)(B), the SSI statute, makes the receipt of SSI benefits by otherwise eligible persons confined to state institutions contingent upon that institution's participation in a State plan approved under Title XIX.

3/ Regulations under Title XIX, the Medicaid Statute, require that a state institution must meet the requirements of Section 1861(f) of Title XVIII, 42 U.S.C. §1395x(f)(5), the Medicare Statute, in order to participate in an approved State plan under Title XIX and thereby be eligible to receive Medicaid funds. See 45 C.F.R. §249.10(b)(14)(i)(A). Section 1861(f) requires hospital accreditation by the JCAH. Therefore, loss of accreditation by Pilgrim State required the Secretary to terminate SSI payments to Pilgrim State patients. An exception to the requirement of JCAH accreditation, relevant in this case, is discussed in footnote 10, infra.

one Frank Foe, a patient at Pilgrim State over the age of 65, to join the Woe action as a named plaintiff and to file new claims for injunctive and declaratory relief against the Secretary of HEW and JCAH. Plaintiffs also requested an order temporarily restraining the Secretary from sending out notices to the affected patients of his intent to terminate their SSI benefits. In an order dated November 20, 1975, the district court declined to issue the temporary restraining order and reserved decision on plaintiffs' request to amend the complaint. An appeal from that decision was dismissed by this Court on November 24, 1975 for lack of appellate jurisdiction. (order dated November 24, 1975 by Circuit Judges Moore and Timbers and District Judge Coffrin, Docket Number 75-8335).

Apparently in response to this Court's decision, an action was commenced in the District Court for the Southern District of New York on November 24, 1975, by Kenneth Koe, Lawrence Loe, Matthew Moe and Nathan Noe, all of whom are mental patients over 65 years of age who are involuntarily committed to Pilgrim State Hospital. They brought this action individually and purportedly as a class on behalf of other involuntarily civilly committed patients over 65 years of age in state mental hospitals against F. David Mathews, as Secretary of HEW, Bernice Bernstein, as Regional Commissioner of HEW, and the United States of America. 4/

4/ The venue of the action was subsequently transferred to the Eastern District of New York and the District Court never certified the actions against the federal defendants as a class action.

In their complaint, the appellants apparently raised two claims for relief. The first claim sought declaratory relief and asserted that eligible SSI beneficiaries in public institutions could not be denied their SSI benefits solely because the hospital to which they were committed had lost its JCAH accreditation. Appellants contended that JCAH accreditation was not a statutorily mandated prerequisite because Congress could not have intended to deny SSI benefits to involuntarily civilly committed patients in state mental hospitals solely because the hospital to which they were committed had lost its JCAH accreditation. Alternatively, appellants asserted that if the statute did require prior accreditation, it was invidiously discriminatory and, therefore, in violation of equal protection because it was directed primarily against the involuntarily civilly committed who, unlike voluntary patients, have no choice as to the hospital in which they are to receive treatment. Appellants' second claim for relief apparently sought a declaratory judgment that JCAH accreditation was not a statutorily required prerequisite to participation by a state institution in a Title XIX State plan under which it would be eligible to receive Medicaid reimbursement funds. Alternatively, appellants sought a declaration of the requirement's unconstitutionality on equal protection grounds. Appellants seemingly based their right to assert this claim on the fact that they were the indirect beneficiaries of the Medicaid reimbursement payments made to the public institution

6a.

in which they were patients, and that, therefore, a denial of such payments to the hospital by reason of its ineligibility to participate in a State plan under Title XIX would indirectly constitute a denial of benefits to the appellants.

The potential cut-off of SSI benefits which prompted appellants' lawsuit never materialized. On December 18, 1975, the Social Security Administration notified the Director of Pilgrim Psychiatric Center that patients over the age of 65 would not lose their SSI benefits due to the approval of a section of the center as a "distinct part" psychiatric hospital. 5/ (C-4). Subsequently, on February 18, 1976, the Social Security Administration notified the Director that since the JCAH had recertified the Center for a one-year period retroactively commencing on December 12, 1975, the Center would remain eligible for participation in the Medicaid reimbursement program under Title XIX, and all eligible patients, including those not housed in the "distinct part" facility and the under 21, would therefore continue to receive their SSI benefits. 6/

On May 11, 1976, the federal defendants moved to dismiss the Koe complaint under Rule 12(b) of the Federal Rules of Civil Procedure, asserting that the district court lacked jurisdiction over the subject matter, the complaint failed to state a cause of action upon which relief could be granted, and that the matter had become moot because of

5/ See note 10, infra.

6/ Since the termination of Pilgrim's eligibility for Medicaid participation under Title XIX, and appellants' consequent eligibility for SSI benefits under Title XVI was not to be effective until January 1, 1976, appellants were never deprived of their SSI benefits.

Pilgrim's recertification. While this motion was pending, appellants moved in district court to consolidate the Woe, Yoe and Koe complaints and to certify the Koe action as a class action to include all involuntarily civilly committed state mental patients of all ages who were or would be eligible for SSI benefits except for the fact that the hospital to which they were committed is no longer eligible to receive Medicaid payments under Title XIX because of its having been disaccredited by JCAH.

The district court, by its decision and order of January 13, 1977, dismissed appellants' claims against the federal defendants in both the Koe and Yoe actions. The court found that, as to the federal defendants, the subject matter of the Yoe complaint was identical to that of Woe v. Mathews, which had been previously dismissed by the district court. The court also granted the federal defendants' motion to dismiss the Koe action, finding that appellants' claims had become moot since they were no longer in danger of losing their SSI benefits. At the same time, the district court denied the Koe plaintiffs' motions for class certification, holding that since appellants were no longer in danger of losing their SSI benefits, they could not "act as class representatives of an action premised on the allegedly illegal deprivation of those benefits." (C-4). In addition,

the district court denied appellants' motion to amend their complaints to add the JCAH and its agents as defendants and to add a new cause of action alleging the unconstitutional abridgement of their right to vote, finding the latter claim "utterly unrelated" to the claims previously tendered. (C-5). Finally, the district court granted appellants' motion to consolidate the Woe and Yoe actions for the continuance of appellants' lawsuit against the state defendants. Appellants' motion to consolidate the Koe action was denied since that action had been dismissed. (C-7).

Appellants' now appeal from the dismissal of the complaint against the federal defendants by the district court on the grounds that the court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted against the federal defendants. The federal appellees submit that the dismissal was correct because, as the district court found, the appellants are "not in danger of losing their SSI benefits" and "[the] action is moot." (C-4, 5).

POINT I

THE DISTRICT COURT LACKED JURIS-
DICTION OVER THE KOE APPELLANTS'
CLAIM TO SUPPLEMENTAL SECURITY
INCOME BENEFITS BECAUSE APPELLANTS
FAILED TO EXHAUST THEIR ADMINIS-
TRATIVE REMEDIES AND THE CASE WAS
NOT RIPE FOR REVIEW.

Appellants, in their complaint, allege a violation of equal protection arising from the connection between the prerequisite of JCAH accreditation for the receipt of Title XIX Medicaid funds by state institutions and the receipt of incidental SSI benefits by involuntarily committed patients in those institutions. This portion of the complaint was not properly before the district court and should be dismissed for lack of jurisdiction. The Supreme Court has stated that "[w]here Congress . . . clearly command[s] that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own. . . ." Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947). This rule is fully applicable to the instant case. In Weinberger v. Salfi, 422 U.S. 794, (1975), the Supreme Court held that suits to recover social security benefits are not properly before a federal court on any jurisdictional base other than Section 205(g) of the Social Security Act, 42 U.S.C. §405(g). The Supreme Court based this holding on its interpretation of Section 205(h), 42 U.S.C. §405(h), which provides that "[n]o action against the United States [or] the Secretary . . . shall be brought under

[Sections 1331 et seq.] of Title 28 to recover on any claim under [Title II of the Social Security Act.]" 7/ The Supreme Court interpreted this provision as precluding the use of the general jurisdictional statutes contained in Title 28, U.S.C. §1331 et seq. in reference to suits arising under the Social Security Act. 8/ The Salfi Court further held that this

7/ While the claim in Salfi involved Title II survivors' benefits rather than Title XIX SSI benefits, Title XVI specifically incorporates the Title II judicial review provisions which Salfi interpreted. Social Security Act Section 631(c)(3), 42 U.S.C. §1383(c)(3), incorporates sections 205(g) and (h), 42 U.S.C. §§405(g) and (h). While Section 1631(c)(3) does not expressly refer to Section 205(h), it does provide that "[t]he final determination of the Secretary. . . shall be subject to judicial review as provided in Section 205(g) of this title to the same extent as the Secretary's final determination under Section 205 of this Title." 42 U.S.C. §1383(c)(3). Therefore, the statutory interpretations of the Salfi decision are clearly as applicable to cases, such as the present one, dealing with SSI benefits as they are to cases involving survivors' benefits, and at least one Circuit has already so recognized. In Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976), patients whose SSI benefits had been terminated upon their hospitalization in a public mental hospital brought suit under Title 28 challenging the constitutionality of the state and federal statutes under which their benefits were terminated. While the court found that plaintiffs had satisfied the jurisdictional requirements of Section 205(g), and thus avoided the necessity of an express ruling on the question whether the preclusion of remedies in Section 205(h) was applicable to Title XVI, it implicitly affirmed the district court's finding that that section provided the only jurisdictional avenue for judicial review open to plaintiffs.

8/ While some recent decisions have cast doubt on Salfi's strict interpretation of the Section 205(h) preclusion as applied to claims for which the Social Security Act provides no procedure for seeking judicial review, there is no doubt that Section 205(h) precludes a claimant from seeking judicial review under 28 U.S.C. §1331 et seq. in cases where a judicial review procedure is statutorily provided under Section 205(g) or where Section 205(g) has been incorporated, as in this case. See, e.g., Dr. John T. MacDonald Foundation, Inc. v. Mathews, 534 F.2d 633, 634 (5th Cir. 1976).

provision was applicable to all cases where claims for benefits under the Social Security Act were involved, regardless of whether constitutional issues were also involved. Thus, although the Salfi plaintiffs alleged a violation of due process, the Supreme Court held the preclusion of Section 205(h) applicable because "it [was] the Social Security Act which provide[d] both the standing and the substantive basis for the presentation of their constitutional contentions...." 95 S. Ct. at 2464.

In the instant case, as in Salfi, although constitutional claims regarding SSI are involved, the "standing and the substantive basis" of the suit is the Social Security Act. Thus, the only jurisdictional avenue available to appellants was Section 205(g).

Appellants have not met the requirements of Section 205(g) and, therefore, were not properly before the district court. Section 205(g) is addressed to judicial review of agency action in social security matters and makes the administrative law requirement of exhaustion of administrative remedies a statutory prerequisite to judicial review. Before a plaintiff may use Section 205(g) as his jurisdictional base, he must obtain a final determination from the Secretary of HEW after an administrative hearing. In the present case, appellants did not bother to allege exhaustion of their administrative remedies. On November 25, 1975, the Secretary of

HEW notified the Director of Pilgrim State of his intention to suspend SSI benefits to appellants, pursuant to Section 1611(e)(1)(B) of the Social Security Act. While other patients similarly situated pursued their administrative remedies by requesting HEW to reconsider its initial determination pursuant to administrative regulations, appellants, in direct contravention of the applicable regulations, chose to proceed directly in federal court. Thus, appellants at no time requested an administrative hearing to reconsider the Secretary's decision. While appellants suffered no injury in any event -- since the Secretary's retroactive recertification of Pilgrim State restored full benefits to them -- they would have been fully protected had they followed the required administrative procedure. The Code of Federal Regulations, 20 C.F.R. 416.1336, Federal Register, October 9, 1975, p. 47488, provides that the notice of intent to suspend payments shall allow 30 days from the date of receipt for the individual to request reconsideration. If reconsideration is requested within 10 days of the receipt of notice, payments are continued until a decision on the reconsideration is issued, unless the individual waives his right to continuation of payment. Thus, appellants' failure to follow administrative procedure was totally without justification.

In addition to having failed even to seek an administrative hearing, as required by Section 205(g), appellants

failed even to allege that there had been a final administrative decision, the second statutory prerequisite to judicial review under Section 205(g). Without such a final administrative decision, appellants may not claim jurisdiction under Section 205(g). In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court discussed the requirement of a final administrative decision under Section 205(g). According to the Court, while the Secretary might, by his actions, waive the requirement that administrative remedies be exhausted before appeal to the district court, there could be no such waiver unless a claim for benefits -- or reconsideration -- was at least presented to the Secretary. Absent the presentation of such a claim to the agency there could be no final administrative decision of any type. 424 U.S. at 328. Thus, by filing this action before making their claim to the Secretary and before the Secretary's decision, the appellants failed to obtain the final administrative decision required by Section 205(g). In Salfi, the Supreme Court emphasized that it is the Secretary who is to determine when administrative remedies have been exhausted for purposes of Section 205(g). 422 U.S. at 766. In general, therefore, the Court will look to the regulations formulated by the Secretary under the Act to determine what constitutes a final decision of the Secretary which is reviewable under Section 205(g). According to the regulations formulated

under the Social Security Act, the final decision of the Secretary is the decision of the Appeals Council. This is the only administrative decision directly appealable to the federal court (20 C.F.R. 404.901 et seq.). As the Ninth Circuit recognized in Ensey v. Richardson, 469 F.2d 664 (9th Cir. 1972), a case dealing with Section 205(g) and (h), "[t]he administrative procedures by which a claimant may obtain a judicially reviewable 'final decision' . . . requires, inter alia, that a request be made of the Appeals Council for review of the Hearing Examiner's decision. . . . The failure to pursue and exhaust these administrative remedies precludes judicial review of the matter." Id. at 666.

The Supreme Court in Salfi found that jurisdiction under Section 205(g) was available to the named appellees although they had failed to comply with the literal requirements of Section 205(g), which mandated an administrative appeal of the Secretary's decision. Importantly however, that determination was based on the Supreme Court's conclusion that the Secretary, in failing to challenge the district court's jurisdiction, had implicitly decided that further administrative adjudication would be futile since the only issue remaining was a constitutional one beyond the scope of his authority. 422 U.S. at 767. The Supreme Court made clear that, in the absence of such a determination by the Secretary, complete exhaustion is necessary before a district court can obtain

jurisdiction under Section 205(g). The Court implicitly reaffirmed this view in a later case, Mathews v. Diaz, 426 U.S. 67 (1976). In Mathews, the Court concluded that the Secretary had waived the requirement of exhaustion because, at the hearing, the Secretary had stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only remaining issue was the constitutionality of the statute. Therefore, the Court concluded that, as in Salfi, the Secretary had implicitly stipulated that the issue for decision was beyond his competence.

The Secretary does not feel that the use of the administrative process would be futile in the instant case, and has taken no steps indicating an intention to waive the requirements of Section 205(g). In fact, the federal appellees moved in the district court to dismiss this action for lack of subject matter jurisdiction and have at all times contested that court's jurisdiction. Moreover, the complexity and confusion of the fact situation in this case makes a final administrative determination crucial in order for the district court to make a proper decision on the legal issues. The status of appellant's SSI claim is totally unclear because at the time the complaint was filed appellants were actually receiving the benefits for which they were suing, and are at present still receiving those benefits. In fact, although a notice of intent to suspend payments was mailed to each appellant, no final action was ever

taken, due to the qualification of Pilgrim Psychiatric Center as a "distinct part" psychiatric hospital under Title XVIII, and the subsequent reaccreditation of the entire Center. Thus, it is not clear whether appellants even had standing to complain of a denial of SSI benefits or to question the constitutionality of the statute under which they were receiving those benefits. Until the status of the tendered claims is finally resolved administratively, appellants have not satisfied the Section 205(g) requirement of a final and, therefore, appealable decision. In McKart v. United States, 395 U.S. 185 (1969), the Supreme Court pointed out that one of the key reasons for requiring exhaustion was to avoid a premature interruption of the administrative process, as well as to give the agency an opportunity to exercise its discretion and expertise to aid judicial efficiency through the development of a factual record. Moreover, as the Court noted:

"[a] complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." Id. at 195.

In the present case, interference by the courts would in fact be premature; it would deprive the agency of the opportunity to review and determine the factual situation and would put the court in the position of having to piece together a factual record without the aid of an agency record

and final decision of the Secretary. Clearly, this is a case in which exhaustion of administrative remedies is necessary. Unlike the situation of the named plaintiffs in Salfi, appellants here do not allege exhaustion of remedies, the Secretary has not made a determination that administrative remedies have been exhausted, nor acted in any way which can be construed as a waiver of the requirement, and the factual situation with regard to the claimed benefits has not been administratively determined.

It is also clear from Salfi that the judicially created exceptions to exhaustion of administrative remedies do not apply to cases brought under the Social Security Act. ^{9/} This is so because the requirement of exhaustion under the Act is mandated by Congress in the clear statutory language of Section 205(g) and not a mere judicially created requirement to which courts may create their own exceptions. 422 U.S. at 766. Thus, cases arising under the Social Security Act are clearly distinguishable from cases such as McKart, where there was no statutory mandate of exhaustion and the court was free to dispense with the use of the administrative process and allow the case to proceed. In cases such as the present one, governed by a statute which makes a final decision of the Secretary a

^{9/} In both Salfi and Mathews v. Diaz, discussed supra, it was the Secretary's implicit waiver of the exhaustion requirement of Section 205(g), rather than a judicial balancing of factors, which led the Supreme Court to conclude that the district court could properly assume jurisdiction over the controversy.

prerequisite to entrance into federal court, an exception to the exhaustion requirement may be made only when the Secretary decides that an appeal within the agency would be futile because the only matters involved are beyond his competence. 422 U.S. at 767.

Therefore, since appellants have failed to exhaust their administrative remedies as required by Section 205(g) and regulations promulgated by the Secretary pursuant thereto, it is clear that they may not claim jurisdiction under Section 205(g) of the Social Security Act. Under the decision of the Supreme Court in Weinberger v. Salfi, supra, and the statutory mandate of Sections 205(g) and (h) of the Social Security Act, appellants' complaint with regard to social security benefits should be dismissed for lack of jurisdiction.

Should this Court determine that the requirement of exhaustion of administrative remedies was not statutorily mandated by Section 205(h), in this case, and that the jurisdictional provisions of Title 28, U.S.C. §1331 et seq., were available to appellants, there are still pressing reasons why the district court, in the proper exercise of its discretion, should have required appellants to exhaust their administrative remedies before assuming jurisdiction. The general rule regarding exhaustion of administrative remedies is clear -- when Congress has statutorily provided an administrative process capable of resolving a controversy, that procedure must be utilized. Only after a final administrative decision may the

aggrieved party invoke the jurisdiction of the federal court. American Federation of Government Employees v. Resor, 442 F.2d 993 (3d Cir. 1971); Accord Burns v. McCrary, 229 F.2d 286 (2d Cir. 1956). Section 1611(c)(3) of the Social Security Act, 42 U.S.C. §1383(c)(3), provides a statutory review procedure applicable to this case. That section provides, in pertinent part:

- (1) The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual. . . and is in disagreement with any determination under this title....

Only in three instances should a court dispense with the available statutory procedure - "where the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury, or where there is a clear and unambiguous statutory violation....," Aircraft and Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 773 (1947); also Greene v. United States, 376 U.S. 149 (1964) and Brown v. General Services Administration, 507 F.2d 1300 (2d Cir. 1974), or where there is a colorable constitutional claim such that an erroneous administrative determination of benefits would damage the beneficiary in a way not recompensable through retroactive payments. Mathews v. Eldridge, 424 U.S. 319, 331 (1976); Califano v. Sanders, 430 U.S. 99, 108-109 (1977). Appellees assert that the facts of the instant case do not justify a

departure from the administrative process on any of these grounds. While appellants' claim allegedly involves a constitutional question, there has been no showing that the prescribed administrative relief is inadequate to prevent irreparable injury in this case. On the contrary, the prescribed administrative procedure is specifically designed to prevent any harm to contestants during the pendency of the administrative process. If the recipient of a notice of intent to suspend requests an appeal within ten days of its receipt, the SSI benefit payments will be continued until a decision on such appeal is issued. 20 C.F.R. 416.1336, 40 F.R. p. 7488, October 9, 1975. Thus, appellants can follow the prescribed statutory procedure and not be injured in any way. In any case, appellants would clearly be in no danger of suffering irreparable injury by being required to follow proper administrative procedure at this time, since they are at present in no danger of losing their SSI benefits.

Similarly, appellants are not aided in this case by the claim that since only a question of law is involved the issue is beyond the competence of the Secretary and that therefore the court is free to intervene. On the contrary, appellants have presented their claim in the alternative. First, they contend that the statute involved in this case is not being applied according to the intent of Congress. Only in the alternative do they assert that the statute is unconstitutional.

The federal defendants assert that the agency must be permitted to construe this statute in the first instance. As Justice White, concurring in McKart noted, "[q]uestions of law have not, in the past, been thought to be immune from exhaustion requirements. Indeed, [the Supreme Court] has emphasized that the expertise of the responsible agency is entitled to great deference in matters of statutory construction. . . ." 395 U.S. at 205 (citations omitted). Accord, American General Ins. Co. v. FTC, 496 F.2d 197, 200 (5th Cir. 1974).

Moreover, requiring appellants to comply with the statutorily provided process for administrative review would clearly serve the basic purpose of the exhaustion doctrine which is "to allow an administrative agency to perform functions within its special competence -- to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972). Finally, as the Supreme Court noted in McKart, "it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." 395 U.S. at 195.

Therefore, since Congress saw fit to mandate an administrative procedure for the initial determination of claims arising under Title XVI of the Social Security Act, and, since appellants have failed either to comply with that

procedure or allege facts demonstrating the threat of irreparable injury or a clear and unambiguous statutory violation which would justify premature interference by the district court, appellees request that this Court dismiss appellants' complaint for lack of jurisdiction.

POINT II

THE DISTRICT COURT CORRECTLY FOUND
THE CLAIM AGAINST THE FEDERAL AP-
PELLEES PRESENTED BY THE WOE COM-
PLAINT TO BE MOOT AND PROPERLY DIS-
MISSED THE CLAIM FOR LACK OF SUBJECT
MATTER JURISDICTION AND FAILURE TO
STATE A CLAIM FOR RELIEF

It is a fundamental concept of federal jurisdiction that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971), DeFunis v. Odegaard, 416 U.S. 312, 316 (1974), Ringgold v. United States, 553 F.2d 309, 310 (2d Cir. 1977). It is the contention of the federal appellees that since the approval, on December 12, 1975 of a "distinct part" psychiatric hospital under Title XVIII of the Social Security Act, 10/ and the

10/ On December 12, 1975, 4098 beds in Pilgrim Psychiatric Center became an approved "distinct part" psychiatric hospital under Title XVIII. Consequently, as to patients over the age of 65, in that distinct part, Medicaid reimbursement payments and therefore SSI benefits continued without interruption.

Title XVI, Section 1611(e)(1)(B), 42 U.S.C. §1382(e)(1)(B), provides that in order for a patient confined in a state mental hospital to receive SSI benefits, such hospital must be receiving Medicaid payments under a State plan approved under Title XIX of the Social Security Act. Regulations under Title XIX, Section 1905(f)(14), 42 U.S.C. 1396(a)(14), provide that for purposes of Title XIX Medicaid Reimbursement, the hospital must meet the requirements under Title XVIII, Section 1861(f), 42 U.S.C. §1395x(f)(5). See 45 C.F.R. §249.10(b)(14)(i)(A). Under Section 1861(f), the status of the facility, rather than the mere fact of accreditation or non-accreditation, is the controlling factor. Thus, Section 1861(f)(5) states that a distinct part of a non-accredited psychiatric hospital "shall be considered to be a psychiatric hospital if...such distinct part meets requirements equivalent to such accreditation requirements as determined by the Secretary." Therefore, such a "distinct part" would be eligible for Medicaid reimbursement payments and, consequently, patients confined therein would not lose their contingent SSI benefits.

subsequent retroactive approval of SSI benefits for all patients who would have been affected by the contemplated termination, following recertification of Pilgrim State by the JCAH, assured the uninterrupted receipt of SSI benefits by appellants, their claim against the federal appellees became moot and abated.

Article III of the Constitution, upon which the exercise of judicial power depends, requires the existence of a "case or controversy" between the parties to the lawsuit. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). Moreover, as the Supreme Court recently observed, an actual controversy must exist at all states of review, not merely when the complaint is filed. Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974). While it is apparent that such a controversy existed at the time this action was commenced, it is equally clear that such a controversy no longer exists since appellants are, at present, in no danger of losing their SSI benefits. Therefore, appellants' claim is moot.

The Supreme Court recently addressed itself to a closely related issue in Preiser v. Newkirk, 422 U.S. 395 (1975); there a prison inmate, transferred from a medium to a maximum security facility without notice or hearing, sought a declaratory judgment that his summary transfer was in violation of the due process clause and requested an injunction against such transfer in the future. The Second Circuit, while noting that petitioner had subsequently been returned to the medium security prison, held that his suit was not

moot because "he remained subject to a new transfer at any time. . . ." 499 F.2d at 1219. Significantly, the Supreme Court reversed, reaffirming the test set forth by an earlier Court in Maryland Casualty Co. v. Pacific Co., 312 U.S. 270 (1941), for determining when a request for declaratory relief has become moot. According to the Court, the facts alleged must show a substantial controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 422 U.S. at 402, quoting 312 U.S. at 273. The federal appellees contend that since the proposed termination of SSI benefits has been abandoned, there is, at present, no controversy which would warrant the declaratory relief sought. As in Preiser, the mere fact that appellants' SSI benefits may be terminated in the future does not present a sufficient controversy to merit declaratory relief at this time.

Only two situations have been recognized which will prevent a court from dismissing a claim as moot in this context. First, where the harm alleged is "capable of repetition, yet evading review", Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); the courts will reach the merits although the immediate danger has momentarily passed. Second, a court will not dismiss a claim as moot if, although it is moot as to the named plaintiff, the case has been certified as a class action and the controversy is alive as to any member of the class.

Sosna v. Iowa, 419 U.S. 393, 399 (1975). The instant case falls within neither of these exceptions. The mere possibility that the Social Security Administration may terminate appellants' SSI benefits at some time in the future is too remote and speculative to bring this case within the first mentioned exception. That exception has been limited to the situation where two elements combine. First, the challenged action must have been too short in duration to be fully litigated prior to its cessation and second, there must be a reasonable expectation that the same complainant will again be subjected to the same action in the future. Weinstein v. Bradford, 423 U.S. 147, 149 (1975). The instant case does not meet this test. Even if the challenged procedure should be instituted in the future there will be ample opportunity for full and effective appellate review at that time. Thus, there is no reason to suppose that the issues raised by appellants will in the future evade review. It is equally clear that this case does not fall within the exception recognized where a case has been certified as a class action. The district court correctly concluded that "[p]laintiffs, who are not now in danger of losing their SSI payments, cannot act as class representatives of an action premised on the illegal disposition of those benefits." (Memorandum and Order of District Judge Neaher, dated January 13, 1977, pages 4-5).

The proper standard for certification of a class action was clearly stated by the Supreme Court in Sosna v. Iowa, 419 U.S. 393 (1975). In addition to demonstrating the existence of an actual controversy at the time of review, the named plaintiff "must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." Id. at 403. Where, as in this case, the controversy has been resolved as to the named plaintiff prior to the district court's ruling on certification, that party may not represent the class. Weinberger v. Salfi, supra, 422 U.S. at 749. This conclusion is not contrary to that of the Supreme Court in Sosna. That case held only that once an action has been properly certified as a class action, the issue does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs. 419 U.S. at 401. 11/

11/ While the Court indicated that where the matter is resolved as to the named plaintiffs before the district court had time to rule on the application for class status the certification may sometimes be said to "relate-back," 419 U.S. at 402 n. 11, that exception is not applicable here, since the controversy became moot as to all members of the proposed class upon the Secretary's decision not to terminate SSI benefits.

Even if appellants could establish jurisdiction for themselves, let alone for their purported class, certification of the class would still be inappropriate. Inasmuch as the benefit of any declaratory or injunctive relief that plaintiffs might have obtained would extend to all others similarly situated, maintenance of a class action would create an unnecessary procedural burden on the Court. Under such circumstances, courts have frequently held that it is appropriate to deny class action treatment. Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir.), cert. denied, 447 U.S. 936 (1973); Vulcan Society of New York City, Inc. v. Civil Service Commission, 490 F.2d 387, 399 (2d Cir. 1973); McDonald v. McLucas, 371 F. Supp. 831, 833 (S.D.N.Y. 1974) (3 judge court), aff'd, 419 U.S. 987 (1974); Tyson v. New York Housing Authority, 369 F. Supp. 513, 516 (S.D.N.Y. 1974). See also Wells v. Malloy, 510 F.2d 74, 76 n.3 (2d Cir. 1975).

Finally, it should be noted that on May 14, 1976, in an apparent attempt to salvage a lawsuit recognizably mooted as to the original plaintiffs, appellants moved for certification of a class to include all involuntarily civilly committed patients in state mental hospitals who are, or would be, deprived of SSI benefits solely because the institution to which they are committed is unaccredited. On February 18, 1976, the Secretary of HEW notified the Director of Pilgrim Psychiatric Center that the entire facility had been retroactively reaccredited by the JCAH as of December 12, 1975. Thus, no patients are presently threatened with termination of SSI benefits.

Appellants contend, however, that the appeal should be permitted to proceed under the relaxation of the mootness doctrine provided by Sosna v. Iowa, 419 U.S. 393 (1975), and its progeny, in particular a recent decision of this Court, White v. Mathews, 559 F.2d 852 (2d Cir. 1977). In Sosna, the Court acknowledged the possibility that special allowance may at times be necessary for claims that evaporate as the suit unfolds:

There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

419 U.S. at 402 n.11. Slip Op. at 7423. This exception was adopted in White v. Mathews, supra, where plaintiffs, a class of disability claimants, successfully challenged the "glacial pace" at which the Social Security Administration ("SSA") adjudicated their claims. The named plaintiff obtained the desired administrative hearing before the class had been certified by the District Court, thus ending his controversy with the SSA. The Second Circuit, relying on Sosna, declined to dismiss the appeal on the ground that the named plaintiff had alleged a sufficient controversy at the time he moved for class certification, that under the particular circumstances of the case application of the mootness doctrine would deprive the District Court of sufficient time "for a carefully considered ruling on the class issue" and enable the SSA to "avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification." Slip Op. at 4723-4724.

Appellants do not come within the White v. Mathews exception which was implicitly limited to the circumstances of that case. First, plaintiffs cannot contend that they had met the requirements of class certification at the time of their motion since the District Court properly held in denying the motion that the members of the class had failed to exhaust their administrative remedies. Since the action necessarily

arises under Section 405(g), its exhaustion requirement precludes class action determination.

Admittedly this distinction assumes the applicability of the exhaustion requirement as precluding a class action. Nevertheless, even if the exhaustion requirement were inapplicable to the members of the class, equally persuasive reasons remain compelling dismissal of the appeal. First, White v. Mathews is by its own terms limited to the situation where the purported class was actually certified following the circumstances giving rise to mootness. The Court's concern was to allow district judges sufficient time "for a carefully considered ruling on the class issue." Here, however, no class has ever been certified, before or after the named appellants obtained their claimed relief.

More important, the underlying basis for the exception, that otherwise the issue would evade judicial review, is absent from this appeal. As the Second Circuit pointedly noted in White v. Mathews, supra, the issue in that case "does not affect the merits of the underlying statutory issue - whether claimants in White's class are entitled to benefits - that will ultimately be subjected to administrative process." Slip Op. at 4721. Rather, the issue was more fundamentally the scope of the Secretary's discretion; whether it entitled the Secretary to review plaintiffs' claims at a "glacial pace." The Secretary could therefore have permanently avoided judicial

review of his discretion simply by holding the disputed disability hearing at any time prior to certification of the class. Under such circumstances, the underlying issue - whether the Secretary had exceeded his discretion - could never be reviewed either administratively, since it is not a matter falling within the Secretary's expertise, or judicially, because the mootness doctrine could always be used to circumvent such review.

Here, however, the underlying issue, whether or not the Secretary has properly appraised the SSI entitlement, falls squarely within the Secretary's administrative expertise. More important, the Secretary can avoid judicial review only by granting plaintiffs the very relief which they seek judicially. Therefore, in marked contrast to White v. Mathews, supra, plaintiffs would be deprived of the right to seek judicial review of their claim only insofar as that claim was satisfied through pursuit of the administrative remedies prescribed by the Secretary. Accordingly, the same reasons which underlie the requirement of administrative exhaustion as to claims falling within the Secretary's expertise similarly demonstrate that the mootness doctrine should apply.

Thus in Boyd v. [redacted] of Special Term, Part I, 546 F.2d 526 (2d Cir. 1976), the purported plaintiff class sought declaratory and injunctive relief to vindicate their right to assignment of counsel in state divorce proceedings.

This Court dismissed the appeal for mootness on the ground that the named plaintiffs had subsequently obtained counsel in their divorce proceedings. The Court rejected the defense that the criterion of mootness should relate back to the filing of the complaint as follows (546 F.2d at 527 n. 2):

This is not a case in which certification of the class action can be related back to the date of the filing of the complaint so as to keep the controversy alive. See Gerstein v. Pugh, 420 U.S. 103, 110 n.11, 95 S.Ct. 854, 43 L.Ed. 2d 54 (1975); Sosna, supra, 419 U.S. at 402 n.11, 95 S.Ct. 559. The relation back exception created in Gerstein and Sosna contemplates controversies so transitory that mootness inevitably intervenes before the District Court can "reasonably be expected to rule on a certification motion".

The exception is equally inapplicable to the instant appeal. The circumstances leading to mootness occurred before Judge Neaher dismissed the complaint and as the result of independent action taken by the named appellants to pursue their administrative remedies, thereby obtaining the substantive relief which they had sought simultaneously in the judicial forum.

Therefore, since there is clearly no actual controversy between the parties to this lawsuit and since the action falls within neither of the recognized exceptions to the mootness doctrine, the decision of the district court dismissing the action as moot should be affirmed.

POINT III

THE KOE APPELLANTS LACK STANDING
TO CHALLENGE THE CUT-OFF OF TITLE
XIX MEDICAID REIMBURSEMENT FUNDS
TO PILGRIM PSYCHIATRIC CENTER

Whenever the threshold question of whether a party has standing to sue is raised, the court must determine whether plaintiff has "'alleged such a personal stake in the outcome of the controversy' to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-99 (1975), quoting Baker v. Carr, 369 U.S. 186, 204 (1962). The federal appellees assert that appellants have not met this test in this case and that the district court was without jurisdiction to entertain appellants' Title XIX claim. Indeed, apparently deeming appellants' Title XIX claim too insubstantial to merit discussion, District Judge Neaher did not even address this claim. Appellees do so now only for the convenience of this Court.

In Association of Data Processing Service Organization v. Camp, 397 U.S. 150, 152-53 (1970), the Supreme Court set forth a flexible formula for the determination of whether a party has standing to challenge an administrative action. Two essential criteria must be examined: (1) whether the plaintiff alleges that the challenged actions has caused him injury in fact, economic or otherwise, and, (2) whether the interest sought to be protected is arguably within the zone of interests

to be protected or regulated by the statute in question. The appellees assert that in this case neither of these requirements has been met. Title XIX Medicaid is one of the "cooperative federalism" welfare programs jointly administered by the state and federal governments. Title XIX, 42 U.S.C. §1396 et seq., provides that when a state has in effect a medical assistance plan, approved by the Secretary, federal funds will be provided to pay for, at the minimum, half the costs of medical assistance. 12/ With respect to payments by states to providers of Medicaid services, such as Pilgrim Psychiatric Center, Title XIX requires that "[a] state plan for medical assistance must . . . provide . . . for payment of the reasonable cost of inpatient hospital services provided under the plan. . ." 42 U.S.C. §1396(a)(13)(D). Thus, so long as Pilgrim Psychiatric Center qualified as an inpatient hospital under Section 1905(a)(14) of the Social Security Act, 42 U.S.C. §1396 d(a)(14), 13/ it was entitled to receive

12/ In Woe v. Mathews, discussed in note 1, supra, this Court considered the question whether it was constitutionally permissible to exclude state mental patients between the ages of 21 and 65 from Medicaid coverage in determining the amount of federal reimbursement funds to be paid to state mental hospitals under Title XIX Medicaid. This Court held that such an exclusion was permissible. Appellants in the instant case raise no such claim. Indeed, patients over the age of 65 are clearly within the coverage of Title XIX. See 42 U.S.C. §1396d(a). Appellants' sole complaint with respect to Title XIX is that they are being unconstitutionally denied the indirect benefit provided by such reimbursement funds because the hospital in which they are patients no longer qualifies for participation in a Title XIX State plan, and is ineligible, therefore, to receive such reimbursement funding.

13/ With respect to the qualification of inpatient hospitals under Title XIX, the applicable regulation, 45 C.F.R. §249.10(b)(14), incorporates the requirements of Title XVIII, §1861(f) of the Social Security Act, 42 U.S.C. §1395x(f)(5), which requires JCAH accreditation.

federal funds under the State plan approved under Title XIX. Withdrawal of JCAH accreditation meant that Pilgrim Psychiatric Center was no longer eligible to receive federal funds under the State plan approved under Title XIX. However, the right of appellants to receive adequate medical care was in no way contingent upon the continued receipt of such funding. Therefore, it is clear that appellants were not the proper parties to challenge the requirements of Title XIX pertaining to eligibility for indirect federal payments to inpatients hospitals. Since appellants reside in a state institution, it would seem that New York State has a statutory duty to supply their medical needs. 14/ Thus, appellants would suffer no injury if State rather than Federal monies continue to support them in their institution. When standing is placed in issue the essential question is whether the party attempting to get his complaint before the court is the "proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." Flast v. Cohen, 392 U.S. 83, 99 (1969). Appellees express no opinion as to whether a justiciable issue is presented by appellants' Title XIX claim. However, it is clear that appellants are not the proper parties to seek judicial assistance. It is

14/ New York Mental Hygiene Law §15.03 provides:

Each patient in a facility and each person receiving services for mental disability shall receive care and treatment that is suited to his needs and skillfully, safely, and humanely administered with full respect for his dignity and personal integrity.

For a more complete discussion of this question, see Woe v. Mathews, 408 F. Supp. 419, 427 (S.D.N.Y. 1976).

equally clear that appellants are not within the "zone of interest" sought to be protected by Title XIX of the Social Security Act since Title XIX is directed primarily toward assisting states in providing adequate medical care.

Therefore, since appellants have failed to meet the liberal requirements for standing mandated by Data Processing, supra, their claim for relief under Title XIX of the Social Security Act should be dismissed.

POINT IV

THE DISTRICT COURT PROPERLY
DISMISSED THE YOE COMPLAINT FOR
LACK OF SUBJECT MATTER JURISDIC-
TION AND FAILURE TO STATE A CLAIM
UPON WHICH RELIEF COULD BE GRANTED

The District Court found, as to the federal appellees, the subject matter of the Yoe action was identical to that of Woe v. Matthews, 408 F. Supp. 419 (E.D.N.Y., 1976), in that both complaints alleged that the exclusion of involuntarily civilly committed patients between the ages of 21 and 65 in state mental hospitals from eligibility for Medicaid benefits, 42 U.S.C. §1396(d), was unconstitutional. An examination of the two complaints demonstrates conclusively that this conclusion was correct. As to the federal appellees, the Yoe complaint is an identical copy of the dismissed Woe complaint, except for the manner in which the allegations of the latter complaint were cut-up, rephrased, renumbered and otherwise rearranged within the former complaint. Such duplication is initially demonstrated by noting that plaintiff's third claim for relief, which commences on page 40 of the Yoe complaint, makes the same allegations as the first claim for relief in the Woe complaint. Indeed, both claims are entitled, "the irrational and invidious Sanist Medicaid exclusions of [Woe/Yoe] and [his/her] class, in general."

In the Woe case, appellants alleged the unconstitutionality of the federal Medicaid statute against the federal

appellees, specifically claiming that the exclusion of inmates of state mental institutions who are between the ages of 21 and 65 from the benefits of Medicaid coverage, 42 U.S.C. §1396(d), is unconstitutional. In its memorandum and order the district court found that the federal appellees had met the burden of showing that the Woe case was on all fours factually and legally with Legion v. Richardson, 354 F. Supp. 456, aff'd sub nom, Legion v. Weinberger, 414 U.S. 1058 (1973). Since the Legion case was binding precedent on the court, the complaint against the federal defendants was dismissed. This Court, in an order dated June 10, 1977, affirmed the district court's dismissal as to the federal appellees. Woe v. Mathews, ___ F.2d ___, Docket No. 76-6031, Slip Opinion (2d Cir., June 10th, 1977).

A close examination of the Yoe complaint makes apparent the duplicate nature of both complaints. For example, the paragraph designated IX of the Woe complaint corresponds almost word for word with the paragraph designated XLIX of the Yoe complaint. Further, the paragraphs designated X, on page 9 of the Woe complaint are exact duplicates of the paragraphs designated L and LI, on page 46 of the Yoe complaint. The only difference between the two complaints, as to the federal appellees, is the compilation of opinions by various experts, giving their views about Medicaid on pages 50-58 of the Yoe complaint. Apart from these opinions,

the two complaints address themselves to the same issues, raise substantially the same facts and request the same relief, as against the federal appellees.

The Yoe complaint names various state and individual defendants, who were not named in the dismissed Woe complaint. Although it is clear that the claims against these new state defendants in the Yoe complaint were expanded and modified from the original claims against the state defendants in the Woe complaint, no such parallel expansion or modification was made against the federal defendants named in the Yoe complaint.

Thus, since the Yoe complaint cannot be factually or legally distinguished from the Woe complaint, the district court properly dismissed the Yoe complaint as to all federal defendants, on the basis of Legion v. Richardson, supra. The federal appellees request that this Court affirm that dismissal.

POINT V

EVEN IF THIS COURT DETERMINES
THAT THE DISTRICT COURT HAD
JURISDICTION OF APPELLANTS'
SSI CLAIM, THERE IS NO EQUAL
PROTECTION VIOLATION IN THE
DENIAL OF SSI BENEFITS TO
RESIDENTS OF UNACCREDITED PUBLIC
MENTAL HOSPITALS

Appellants, in their complaint, alternatively attack the application and constitutionality of Section 1611(e)(1)(B) of the Social Security Act, 42 U.S.C. §1382(e)(1)(B), which provides that an otherwise eligible person who resides in a public institution throughout a full month shall be ineligible for SSI benefits for that month unless the institution in which he resides is receiving Medicaid payments pursuant to a State plan approved under Title XIX of the Act.^{15/}

Appellants appear to contend that Congress did not intend the Title XIX requirement of JCAH accreditation to be a condition precedent to the receipt of SSI benefits by patients confined to state mental hospitals, and assert that, in the alternative, if this was Congress' intent, such a requirement is violative of equal protection because its sole impact is upon patients involuntarily committed to unaccredited state mental hospitals.

^{15/} JCAH accreditation is a prerequisite to participation by a public institution in a Title XIX State plan.

Both of these claims are frivolous and without merit and the declaratory relief which appellants demand must, therefore, be denied. First, the clear wording of Section 1611(e), 42 U.S.C. §1382(e), establishes that the denial of SSI benefits to persons confined in unaccredited state mental hospitals was clearly the result that Congress intended. Appellants' contention that Congress only intended to deny such benefits to inmates of state penal institutions is totally without merit. Under Section 1611(e)(1)(A) of the Social Security Act, 42 U.S.C. §1382(e)(1)(A), inmates of any public institution are made ineligible for SSI benefits. An exception to this general exclusion is made, however, for inmates of public institutions that receive payments under a State plan approved under Title XIX. Section 1611(e)(1)(B), 42 U.S.C. §1382(e)(1)(B).

Pilgrim Psychiatric Center is a public institution within the meaning of the Social Security Act. The definition of "institution" under the regulations is "an establishment which furnishes food and shelter to four or more persons unrelated to the proprietor and, in addition, provides some treatment or services . . .," 20 C.F.R. 416.231(b)(2). Since Pilgrim Psychiatric Center meets the definition of a public institution, its otherwise eligible inmates cannot receive SSI benefits unless Pilgrim is approved for Medicaid payments under a State plan approved under Title XIX.

Pursuant to the Secretary's duty under Title XIX of the Social Security Act to supervise the quality of care rendered to the ill, see Section 1902a(a)(30), 42 U.S.C.A. §1396a(a)(30), the Secretary adopted a regulation pursuant to the authority given him under Title XI of the Social Security Act, Section 1102, 42 U.S.C. §1302, which regulation required psychiatric hospitals treating patients over the age of 65 years to meet the same quality standards as are required under Title XVIII, Section 1861(f) of the Social Security Act. See 45 C.F.R. §249.10(b)(14)(1)(A). This regulation is consistent with the spirit and intent of the Social Security Act and has the full force and effect of law. White v. Finch, 311 F. Supp. 301, 306 (W.D. Pa., 1970).

Section 1861(f)(5) of Title XVIII, 42 U.S.C.A. §1395x(f)(5), establishes the definitional requirements for a "psychiatric hospital." One of the definitional requirements of this section is that the institution "is accredited^{16/} by the Joint Commission on Accreditation of Hospitals."

^{16/} The applicable regulation, adopted by the Secretary, provides the reason for this requirement:

"To provide assurance that the program while paying for active treatment in psychiatric and tuberculosis hospitals would avoid paying for care that is merely custodial, the conditions of participation require that the hospital be accredited by the Joint Commission on Accreditation of Hospitals. . . . (emphasis supplied).

20 C.F.R. §405.1036(a)

Thus, it is evident that once a facility fails to retain its JCAH accreditation, it no longer meets the definition of a "psychiatric hospital" under Section 1861(f)(5) of Title XVIII. Therefore, such facility no longer qualifies for participation in a Title XIX Medicaid reimbursement program, which participation is the statutory prerequisite to receipt of SSI benefits by patients in that facility who would otherwise be eligible to receive SSI benefits. See Section 1611(e)(1)(B), 42 U.S.C. §1382(e)(1)(B).

As can be seen, the Social Security Act, by its terms, provides SSI payments to patients in state mental hospitals only if such hospital is accredited by the JCAH. Once the institution has lost its accreditation and is no longer eligible for Medicaid payments under Title XIX, SSI payments must cease. The only exception to the strict requirement of accreditation occurs where, as in this case, the Secretary approves a "distinct part" of an unaccredited hospital as a psychiatric hospital, under regulations promulgated pursuant to Section 1861(f), 42 U.S.C. §1395x(f)(5). See note 10, supra.

Appellees' interpretation of the Congressional intent behind Section 1611(e)(1)(B), 42 U.S.C. §1382(e)(1)(B), is further buttressed by the legislative history of the

SSI program. The program was established by Congress in 1972 in order to create an entirely federal program which would "provide a positive assurance that the Nation's aged, blind and disabled people would no longer have to subsist at below poverty-level incomes." S. Rep. No. 1230, 90th Cong. 2d Sess. 384 (1972). A central concept of the program, however, was that "beneficiaries and prospective beneficiaries would be required to apply for and make every effort to obtain other benefits for which they might be eligible." S. Rep. No. 1230, 90th Cong. 2d Sess. 386 (1972). Therefore, it was decided that persons in public institutions would generally be excluded from SSI benefits because most of their subsistence needs would be met by the state. S. Rep. No. 1230, 90th Cong. 2d Sess. 386 (1972). However, an exception to this general exclusion was permitted for inmates of such institutions who would otherwise be eligible for SSI benefits if the institution was receiving Medicaid payments under Title XIX. This limited exception was recognized because Congress felt that since the federal government had already accepted some financial responsibility for such individuals through Medicaid reimbursement to their institutions, it would not be incongruous to extend a small stipend, in the form of SSI benefits, to meet their personal needs. S. Rep. No. 1230, 92nd Cong. 2d Sess. 339C (1972). Clearly, Congress did not intend to extend such benefits to persons

in state institutions which were not receiving Medicaid payments -- i.e., unaccredited institutions -- precisely because such institutions did not qualify for the Medicaid payments upon which the payment of SSI benefits were made contingent. Patients in such unaccredited institutions were to remain the total responsibility of the state in which the institution was located. S. Rep. No. 1230, 92nd Cong. 2d Sess. 384C (1972).

Appellants' second contention, that Section 1611(e) (1)(B), 42 U.S.C. §1382(e)(1)(B), is violative of equal protection, is equally unsupportable. The Medicaid statute, like most social welfare statutes, is a "complex statute *** designed to alleviate the cost of health care . . . " Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.), aff'd, 414 U.S. 1058 (1973). Perhaps recognizing the difficulty inherent in administering such a complex statutory framework, the Supreme Court, in the landmark case of Dandridge v. Williams, 397 U.S. 471, 487 (1970), established that in the area of social welfare, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."^{17/} The Court also noted in Dandridge that the Constitution does not empower the Court to second guess officials charged with the difficult responsibility of

^{17/} While the instant case does not directly implicate the Fourteenth Amendment's Equal Protection Clause, since it involves a federal statute, the test articulated in Dandridge is applicable. See Richardson v. Belcher, 404 U.S. 78, 81 (1971).

allocating limited public welfare funds among the myriad of potential recipients. 397 U.S. at 487. More recently, the Court, perhaps intending to clarify its statement in Dandridge, advised that "[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and needy are not subject to a constitutional straight-jacket." Jefferson v. Hackney, 406 U.S. 535, 546 (1972).

The relationship between the exclusion from SSI benefits of otherwise eligible patients in unaccredited state mental institutions is clearly rational and bears a reasonable relationship to the objectives sought to be fulfilled by the Social Security Act. In fact, the Social Security Act, as originally enacted in 1935, to aid the blind and aged, excluded from coverage inmates of public institutions. This exclusion was based on the premise that the care of mentally ill patients in state mental hospitals was the responsibility of the states and not the federal government. See U.S. Code Cong. and Admin. News, p. 2086 (1965). In keeping with this concept, it was determined that persons confined in public institutions would generally be ineligible for SSI benefits. Thus, Section 1611(e)(1)(B), which extends such benefits to patients in state hospitals that are accredited by the JCAH, constitutes a liberalization of this general exclusion. Indeed, the federal government is clearly under no obligation

to extend any benefits to involuntarily civilly committed patients in state mental hospitals. Thus, when Congress chooses to attack a social problem, such as inadequate health care, it may proceed "one step at a time" without denying equal protection, Williamson v. Lee Optical, 348 U.S. 483, 489 (1955), "so long as the line drawn" between steps is "rationally supportable." Geduldig v. Aiello, 417 U.S. 484, 495 (1974). The line drawn in this case is clearly supportable. The federal government has an interest in assuring that the state provide adequate health care to its citizens confined in state mental hospitals and has chosen to enforce this interest by conditioning the extension of federal SSI benefits to patients in such institutions upon the accreditation of those institutions by the JCAH. Where an area is traditionally within the purview of the states, the allocation of federal funds upon certain conditions cannot be deemed irrational. Kantrowitz v. Weinberger, 388 F. Supp. 1127 (D.D.C. 1974).

Thus, if this Court finds that the district court should have exercised jurisdiction over appellants' claims, this Court should remand with directions to enter a judgment dismissing those claims as insubstantial and without merit.

CONCLUSION

The district court's order granting the federal appellees' motion dismissing the Koe and Yoe complaints should be affirmed.

Dated: Brooklyn, New York
January 18, 1978.

Respectfully submitted,

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*The United States Attorney's Office wishes to acknowledge the assistance of Howard C. Crystal, a third-year law student at Brooklyn Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

_____ Sally Reese _____, being duly sworn, says that on the _____ 18th
day of _____ January, 1978 _____, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, Two (2) Copies of Brief for Appellees,
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Morton Birnbaum, Esq. _____

225 Tompkins Avenue _____

Brooklyn, New York 11216 _____

Sworn to before me this
18th day of January, 1978.

Sally Reese
Sally Reese _____

PEGGY B. FLOYD
Notary Public, State of New York
No. 01111111
Commission Expires March 30, 19____

